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No. 950

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN W. McGRATH CORPORATION, ET AL., PETITIONERS

v.

THOMAS F. HUGHES, DEPUTY COMMISSIONER, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE DEPUTY COMMISSIONER IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Pet. 23-26) has not yet been reported. The opinion of the Court of Appeals for the Second Circuit (Pet. 19-22) is reported at 264 F. 2d 314.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1959. The petition for a writ of certiorari was filed on May 26, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether both courts below correctly decided that the repeated declarations of the deceased longshoreman that he was injured when pulling a vessel by line while aboard a lighter were corroborated by substantial evidence.

STATEMENT

This action to review a compensation award was filed pursuant to Section 21 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 921), and was instituted by petitioners against both John A. Willard, Deputy Commissioner for the United States Department of Labor, Bureau of Employees' Compensation, and the successful claimant before Commissioner Willard, Rose D'Ornellas (Pet. App. 3a-9a).[1] Petitioners subsequently substituted Willard's successor in office, Thomas F. Hughes, as appellee (Pet. App. T112). The pertinent facts are as follows:

In January 1955, the deceased, John D'Ornellas, was employed by petitioner John W. McGrath Corporation as a maintenance man to work on the dock (Pet. App. T6, Pet. 23). On January 14, 1955, D'Ornellas returned from work seriously ill and complained of a severe pain in his chest (Pet. App. T5-T7). His illness was of sufficient severity to cause his wife, who was employed as a practical nurse at a city hospital, to stay home from work the next two days (Saturday and Sunday) in order to nurse her husband and give him medication (Pet. App. T6, Pet. 25). D'Ornellas was ill continuously from the time that he arrived home (T6-T7). He told his wife that during his work day he had

[1] Pet. App. refers to petitioners' appendix in the court below.

been ordered by one of his supervisors to go aboard a lighter and pull on a rope in order to move a barge (Pet. App. T5-T7, Pet. 25). The deceased further stated to his wife that, while pulling on this line, he became ill, and signalled for help, whereupon one of his supervisors "took him off of the lighter" (Pet. App. T6).

D'Ornellas returned to work Monday, January 17. At about 8:45 a.m. he collapsed and was taken by ambulance to a nearby hospital where he was found to have suffered a myocardial infarction precipitated by a coronary thrombosis (Pet. App. T8, Pet. 6, 20, 23). He remained as a patient in the hospital until February 12, 1955 (Pet. 23). Thereafter, he stayed home as a convalescent until his death on March 5, 1955 (Pet. 6, 23).

On January 22, 1955, while the deceased was still hospitalized, he was examined by Dr. Texon at the request of his employer. Dr. Texon testified that the deceased told him that he first felt the chest pain when he "was pulling a rope to help move a barge around the pier." (Pet. 20, Pet. App. T22).

On February 15, 1955, the deceased filed an employee's claim for compensation in which he stated that during the course of his employment, at 3:00 p.m. on January 14, 1955, he sustained an injury to his chest and heart which was caused by "pulling a lighter by line" (Pet. 23).

After his death, the deceased's widow, Rose D'Ornellas, filed a claim for compensation under the Federal Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*) in which she alleged that her husband had died as a result of an injury received in the course of his employment with the Mc-

Grath Company on or about January 14, 1955 (Pet. 23). The employer and the insurance carrier contested her claim.[2] A full hearing was held before Deputy Commissioner John A. Willard at which, in addition to the above facts, the following testimony and documentary evidence were adduced:

(i) Mr. Lucas, terminal superintendent for the John W. McGrath Corporation, was called as a witness for the employer and the insurance carrier (Pet. App. T63). He testified that it was commonplace for workers to go aboard a lighter and pull a barge, and that while it would have been unusual for the deceased to have done so, it was nevertheless possible that he did (Pet. App. T72). Two other employees of the petitioner also testified that on some occasions the men would stand on a lighter and pull a barge (Pet. App. T58, T60, and T31-T32).

(ii) The claimant introduced a signed statement by one Edward Kinnally, a dock boss for the McGrath Corporation who died before the hearing, that it had been reported to him by several workmen who were there at the time that on January 14, 1955, D'Ornellas "had had a heart attack on a lighter at Pier 9 while he was hauling on a line" (Pet. 20, 26).

(iii) Dr. Seymour Cutler testified that, assuming that the alleged incident occurred (*i.e.*, the pulling of the barge), it was his opinion that the incident was causally related to the myocardial infarction from which D'Ornellas died (Pet. App. T77, Pet. 20).

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[2] Their grounds for contesting were that: (1) the injury did not occur on navigable waters and consequently the Act was inapplicable; (2) there was no accident within the meaning of the law; and (3) there was no causal relation between the alleged injury and the death of D'Ornellas (Pet. App. T3).

In his order of March 6, 1957 (Pet. App. 5a), the Deputy Commissioner granted the claimant an award predicated upon the following findings of fact (Pet. App. 10a-12a):

1. The deceased sustained a personal injury when, while standing on a lighter and pulling a vessel by a line, he suffered a great strain which resulted in a coronary thrombosis.

2. The injury arose out of and in the course of his employment.

3. The injury precipitated the myocardial infarction from which D'Ornellas died.

Petitioners then brought this action to review the Commissioner's award, alleging that his findings were not supported by substantial evidence. The district court granted the Government's motion for summary judgment and accordingly entered judgment in its favor (Pet. App. 21a-27a, Pet. 23-26). The Second Circuit affirmed (Pet. 19-22). Both courts explicitly found that the Deputy Commissioner's findings were supported by substantial evidence.

ARGUMENT

The gravamen of the petitioners' complaint was that the deceased did not, in fact, work aboard a lighter in January 1955, and that the finding of the Deputy Commissioner to the contrary was erroneous and unsupported by substantial evidence. If the Commissioner's finding on this question is correct, then it follows that the deceased received his injury while upon navigable waters [3] and while in the course of his employment, and

[3] See 33 U.S.C. 903(a) and *Johnston* v. *Marshall*, 128 F. 2d 13 (C.A. 9), certiorari denied, 317 U.S. 629.

the propriety of the award would then be beyond dispute. Since this case turns solely upon a factual decision regarding the quantity of evidence supporting the findings of an administrative agency, further review here is not warranted.

The findings of the Deputy Commissioner "are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole." *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 508. Also, Section 23(a) of the Longshoremen's and Harbor Workers' Compensation Act provides that the technical rules of evidence do not apply to procedures before the Deputy Commissioner and that (33 U.S.C. 923(a)):

> Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted *shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.* [Emphasis added.]

Since D'Ornellas told both his wife and Dr. Texon that he was injured while working on a lighter, and made a similar statement in his claim for compensation on February 15, 1955, the sole issue on which petitioners seek review by this Court is whether the two courts below were correct in deciding that there was corroboration in the record for these declarations of the deceased (Pet. App. T6-T7, T22, Pet. 23).

The claimant is not required to produce eye witnesses to her husband's injury in order to corroborate his declarations, but, to the contrary, "[w]hatever tends to make a story substantially more credible or probable corroborates it." *Associated General Con-*

trainers v. *Cardillo*, 106 F. 2d 327, 329 (C.A.D.C.).[4] The following evidence, contained in the record, is ample to meet this requirement:

(i) The deceased's wife testified that, on the day on which the deceased stated that he received his injury, he returned from work "looking terrible" and was continuously ill for three days (Pet. App. T6-T7). A woman of several years' practical nursing experience, she observed his physical condition that day and determined that his illness was of such severity that it required her care and nursing for the next two days, even though that necessitated her staying home from work (Pet. App. T6).

(ii) When the deceased attempted to return to his normal activities on the following Monday, he collapsed with a heart attack and had to be taken to the hospital in an ambulance (Pet. 20, 23).

(iii) Edward Kinnally, a former dock supervisor for the McGrath Corporation who died before the hearing,

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[4] In *Cardillo*, the Court of Appeals stressed the liberality that must attend treatment of claimants under the Act. The court stated (106 F. 2d at 329):

> We should be construing the Act very narrowly if we held, in effect, that awards must be supported by eye-witness testimony. As appellees' counsel point out in their brief: apart from declarations of the deceased, fatal "injuries sustained by employees while working alone or not under observation * * * cannot ordinarily be proved by any means other than the introduction of (1) testimony, such as was adduced in the present case * * * that cuts, bruises, lacerations, or other objective symptoms of injury were observed * * * shortly after the injury was alleged to have been sustained, and (2) medical evidence that the alleged injury could have occurred in the manner described by the decedent and could have caused the condition of the decedent disclosed by medical examination or autopsy." Awards have been sustained in many cases of unwitnessed fatal injuries.

signed a statement that several workers who had been present at the time told him that D'Ornellas had had a heart attack on January 14, 1955, while hauling on a line aboard a lighter (Pet. 20, 26, and Claimant's Exhibit 2).

(iv) George Lucas, McGrath's terminal supervisor, testified that it was not unusual to have a stevedore aboard a lighter pulling a barge and that it was possible that the deceased had done so at the time in question (Pet. App. T72, Pet. 22).

Petitioner attempts to avoid the efficacy of this evidence by arguing that part of it was hearsay and, therefore, incompetent,[5] and the remainder, while competent, was insufficient (Pet. 13). Of the four enumerated evidentiary items, only one (*viz.*, Kinnally's written statement) would not have been admissible under the technical rules of evidence. The remaining three, however, provide more than ample support for the deceased's statements. In *Associated General Contractors* v. *Cardillo*, 106 F. 2d 327 (C.A.D.C.), which also involved a suit under the Longshoremen's and Harbor Workers' Compensation Act for compensation for the death of an employee, the court held that similar evidence was sufficient corroboration. The claimant there alleged that the employee had died of a cerebral hemorrhage, caused by his having struck his right

[5] Corroborative evidence need not be admissible under the technical rules of evidence but need only be such that a reasonable mind might accept it as adequate to support a conclusion. *E.g.*, *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 477; *Ellers* v. *Railroad Retirement Board*, 132 F. 2d 636 (C.A. 2); *National Labor R. Board* v. *Service Wood Heel Co.*, 124 F. 2d 470, 473 (C.A. 1); and *International Association of Machinists, etc.* v. *National Labor Relations Board*, 110 F. 2d 29, 35 (C.A.D.C.), affirmed, 311 U.S. 72.

temple against a filing cabinet in his employer's office. The deceased employee had made several declarations that the injury had occurred as claimed. The sole corroborating evidence was: (1) that on the date of his alleged injury, the deceased had come home ill with a visible wound; and (2) that there was a filing case in his office on which he could have injured himself. The court held that it was sufficient corroboration to show that the deceased manifested the symptoms of an accident on the date on which he said it occurred, and that the injury could have occurred in the way described.

Both the district court and the court of appeals found that there was substantial evidence in the record here to support the Deputy Commissioner's findings, and not merely a "scintilla" of evidence as petitioners claim (Pet. 13). Thus, further review is not warranted. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214; *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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